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13
14 UNITED STATES DISTRICT COURT
15 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

16 WHITEWATER DRAW NATURAL
17 RESOURCE CONSERVATION
18 DISTRICT, *et al.*,

19 Plaintiffs,

20 v.

21 JOHN F. KELLY, *et al.*,

22 Defendants.
23
24
25
26
27

Case No. 3:16-cv-2583

**FEDERAL DEFENDANTS'
MEMORANDUM IN SUPPORT OF
MOTION TO STAY THE
LITIGATION OR, IN THE
ALTERNATIVE, FOR AN
EXTENSION OF TIME FOR
FEDERAL DEFENDANTS
TO RESPOND TO COMPLAINT**

Date: July 3, 2017
Time: 10:30 a.m.
Courtroom: 5B

Hon. H. James Lorenz

1 Plaintiffs assert that the Department of Homeland Security (“DHS” or “Depar-
2 tment”) failed to subject a wide variety of agency immigration policies to analysis under
3 the National Environmental Policy Act (“NEPA”). 42 U.S.C. §§ 4321–4370m. Plain-
4 tiffs’ Complaint identifies 35 purported “actions,” comprising directives, policies, plans
5 for day-to-day operations, internal guidance documents, forms, and in one case, a news-
6 paper article. *See* Compl. ¶¶ 1, 53, 79–82 (Count II); Pls.’ Ex. 1, ECF No. 1-2 to ECF
7 No. 1-6, ECF No. 3-1; Compl. ¶¶ 89–103 (Counts IV and V). Because two Executive
8 Orders issued by President Trump since this lawsuit was filed require DHS to review
9 and potentially “rescind[] or revise” many of the immigration-related policies at issue
10 here, potentially rendering much of Plaintiffs’ complaint moot, Federal Defendants seek
11 a stay of this action until that review is concluded. Given that a significant portion of the
12 180-day review period contemplated by these Executive Orders has already passed, the
13 requested stay will not be of immoderate duration.

14 In the event that this motion is denied, Federal Defendants seek twenty-one days
15 from the date of this order to file their response. A proposed order is attached as Exhibit
16 1. Plaintiffs do not consent to this motion.

17 I. BACKGROUND

18 Plaintiffs consist of resource management groups that address local conservation
19 needs, and organizations advocating for population “stabilization.” *See* Compl. ¶¶ 26–
20 44. DHS is the federal agency charged with the administration and enforcement of the

1 Immigration and Nationality Act and all other laws relating to the immigration and
2 naturalization of aliens. *See* 8 U.S.C. § 1103(a). Plaintiffs filed suit on October 17,
3 2016 contending that DHS’s implementation of federal immigration policy under this
4 authority has caused significant environmental effects that should be analyzed under
5 NEPA. Compl. ¶ 1.

6 Just over three months later, on January 25, 2017, the President of the United
7 States issued two Executive Orders on the topic of immigration reform: “Enhancing
8 Public Safety in the Interior of the United States,” which directs the Secretary of
9 Homeland Security (“Secretary”) to review various immigration actions and policies
10 undertaken by previous Presidential Administrations, and “Border Security and
11 Immigration Enforcement Improvements,” which among other things requires DHS take
12 certain actions relating to the exercise of its parole authority.

13 The Public Safety Order observes that “we cannot faithfully execute the immigra-
14 tion laws of the United States if we exempt classes or categories of removable aliens
15 from potential enforcement” and states that its purpose is “to direct executive depart-
16 ments and agencies (agencies) to employ all lawful means to enforce the immigration
17 laws of the United States.” Presidential Executive Order on Enhancing Public Safety in
18 the Interior of the United States (Jan. 25, 2017) (“Public Safety Executive Order”)
19 (attached hereto as Exhibit 3) (Section 1). It specifically directs the Secretary to “review
20 agency regulations, policies, and procedures for consistency with this order and, if

1 required, publish for notice and comment proposed regulations rescinding or revising
2 any regulations inconsistent with this order and shall consider whether to withdraw or
3 modify any inconsistent policies and procedures, as appropriate and consistent with the
4 law.” *Id.* § 10(b).

5 The Border Security Order observes that “[b]order security is critically important
6 to the national security of United States.” Presidential Executive Order on Border
7 Security and Immigration Enforcement Improvements (Jan. 25, 2017) (“Border Security
8 Executive Order”) (attached hereto as Exhibit 4) (Section 1). As such, the Order lays
9 out federal policy to “expedite determinations of apprehended individuals’ claims of
10 eligibility to remain in the United States” and “remove promptly those individuals whose
11 legal claims to remain in the United States have been lawfully rejected.” *Id.* § 2(c)-(d).
12 The Order directs the Secretary to “take appropriate action to ensure that [the Depart-
13 ment’s] parole authority . . . is exercised only on a case-by-case basis . . . when an indi-
14 vidual demonstrates urgent humanitarian reasons or a significant public benefit derived
15 from such parole.” *Id.* § 11(d).

16 Under the terms of the Public Safety Executive Order, the Secretary is to submit
17 an interim report on the progress of his review within 90 days and a final report detailing
18 the results of his review within 180 days of the Order’s issuance. Public Safety Execu-
19 tive Order § 15. Similarly, the Border Security Executive Order requires the Secretary
20 to compile a report on his progress within 90 days, then requires a report from the

1 Attorney General within 180 days. Border Security Executive Order § 15. The 90-day
2 reports for both Executive Orders currently are under review with the Office of the
3 Secretary. *See* Declaration of Michael T. Dougherty at ¶ 6 (attached hereto as Exhibit
4 2). The second report is due to the President on July 24, 2017. Dougherty Decl. ¶ 6.
5 The reports can be expected to document the results of reviews conducted as directed in
6 the Executive Orders and may include recommendations of the Secretary or statements
7 of planned actions as regards the materials reviewed for possible rescission, revision,
8 withdrawal or modification.

9 II. ARGUMENT

10 The Executive Orders and immigration policy review mark substantial new
11 developments that warrant staying this litigation. A stay will further the Court's
12 interests in avoiding unnecessary adjudication, support the integrity of the administrative
13 process, and ensure due respect for the prerogative of the executive branch to evaluate
14 the policy decisions of prior Administrations.

15 A. The Standard for Granting a Stay

16 Courts have broad discretion to stay proceedings and defer judicial review in the
17 interest of justice and efficiency. “[T]he power to stay proceedings is incidental to the
18 power inherent in every court to control the disposition of the causes on its docket with
19 economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N.*
20 *American Co.*, 299 U.S. 248, 254 (1936). The court must evaluate “the competing

interests which will be affected by the granting or refusal to grant a stay,” including “the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (stay may serve the interests of judicial economy by allowing development of factual and legal issues) (citation omitted). *See also Hawaii Nurses’ Ass’n Collective Bargaining Org. v. Kapiolani Health Care System*, 890 F. Supp. 925, 931 (D. Haw. 1995) (noting that where issue was already before a federal agency and where the federal agency’s ultimate decision would be determinative, “a stay w[ould] serve judicial economy”). Further, agencies generally have authority to reconsider past decisions and to revise, replace, or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

B. As a Result of the Executive Orders, Many of the Challenged Actions Are Likely be Revised or Replaced

The comprehensive policy review contemplated under these two Executive Orders could significantly affect the scope of Plaintiffs’ claims or render moot challenges to various actions and policies enumerated in their Complaint. As noted, the President has directed the Secretary to engage in wide review of various immigration administration

1 and enforcement policies, expressly instructed the Secretary to revise detention and
2 removal forms with an eye to increasing communication with law enforcement agencies,
3 and established a specific period in which to accomplish the review. *See* Public Safety
4 Executive Order §§ 10(b), (c), 15; Border Security Executive Order §§ 11(d), 15. By the
5 terms of the Public Safety Executive Order, for example, this review process may culmi-
6 nate in recommendations for Presidential action, notice and comment rulemaking, or
7 other actions consistent with the law. Public Safety Executive Order § 10. Although the
8 Border Security Executive Order is less explicit, the Order’s mandate to “take appro-
9 priate action” with regards to the Department’s parole authority is likely to result in
10 similar steps and actions. *See* Border Security Executive Order § 11(d). Both orders
11 could result in significant changes to the actions plaintiffs challenge.

12 As an example, the Public Safety Executive Order expressly revokes the “Secure
13 Communities” memorandum, which Plaintiffs challenge as Action 24 (Compl. ¶ 53, at
14 55). *See* Public Safety Executive Order § 10(a). (Compl. ¶ 53, at 55). The Public
15 Safety Executive Order reverses this decision by reinstating the “Secure Communities”
16 program and ending its replacement. *See* Public Safety Executive Order § 10(a). The
17 language of the Public Safety Executive Order also implicates the form described in
18 Plaintiffs’ Complaint (Action Number 17) as the “[n]ew Detainer form . . . which
19 changed the policy on detainers . . . [so that] ICE officers could now only issue detainers
20 for aliens that had been convicted, not just booked, for a crime,” (Compl. ¶ 53, at 53).

1 But the Order directs the Secretary to revise detention and removal forms in order to
2 increase communication with state and local law enforcement agencies. Public Safety
3 Executive Order § 10(c). Rather than litigating plaintiffs’ challenges now, it would be
4 far more efficient to await the Secretary’s revisions to the challenged form.

5 The Public Safety Executive Order also directs the Secretary to “review agency
6 regulations, policies, and procedures for consistency with this order” and to “withdraw
7 or modify any inconsistent policies or procedures.” Public Safety Executive Order
8 § 10(b). In just one example of how DHS’s response to this directive has already
9 affected actions challenged by Plaintiffs, DHS recently replaced Policy 10074.1 with a
10 new policy, Policy 10074.2.¹ Plaintiffs’ Complaint challenges actions, including Action
11 18, premised upon the superseded policy, which Plaintiffs describe as a memorandum
12 that “limited the circumstances under which ICE can issue detainers.” (Compl. ¶ 53, at
13 53 & Ex. 1, ECF 1-6 at 13). Thus, although DHS does “not presently know how many
14 of the actions challenged in this litigation will be rescinded, revised, withdrawn or modi-
15 fied,” Dougherty Decl. ¶ 5, it is clear that the review process has the potential to signi-
16 ficantly impact this litigation.

17 Similarly, the Border Security Executive Order affects a number of the “actions”
18 Plaintiffs challenge that relate to the Secretary’s parole authority, including Action

19
20 ¹ See Issuance of Immigration Detainers by ICE Immigration Officers, Policy
21 Number 10074.2 (Apr. 2, 2017), available at
22 <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>.

1 Number 6, which according to Plaintiffs allegedly “formalize[d] the discretionary power
2 of ‘advance parole,’ [and] allow[ed] aliens in the country to leave and return as
3 parolees.” (Compl. ¶ 53, at 50). The Border Security Executive Order implicates this
4 and other such actions by requiring the exercise of that parole discretion to use on “a
5 case-by-case basis in . . . [and] only when an individual demonstrates urgent humani-
6 tarian reasons or a significant public benefit derived from such parole.” Border Security
7 Executive Order § 11(d). These are just three of the more than two dozen “actions”
8 Plaintiffs challenge that are potentially implicated by the Executive Order. *See* Compl.
9 ¶ 53.

10 As these examples demonstrate, a stay is warranted in this case. The President of
11 the United States has directed the Secretary to immediately take all steps necessary to
12 review a broad range of “previous immigration actions and policies” and, if appropriate,
13 make recommendations that may substantially affect or alter those actions and policies.
14 Public Safety Executive Order § 10(b). The President also directed the Secretary to
15 “ensure that [the Department’s] parole authority . . . is exercised only on a case-by-case
16 basis” in instances in which the potential parolee demonstrates humanitarian need or
17 significant public benefit. Border Security Executive Order § 11(d). Even if the
18 Executive Order reviews would not moot all of plaintiffs’ claims, the results of the
19 required reviews and are likely simplify the “issues, proof, and questions of law” at
20 issue, *Lockyer*, 398 F.3d at 1110, and a stay would serve judicial economy by

1 minimizing the “time and effort for [the Court] itself, for counsel, and for litigants,”
2 *Landis*, 299 U.S. at 254.

3 C. Staying this Action will Ensure Government Resources are Used Most
4 Appropriately During the Executive Order Review Periods

5 Further, a stay will allow DHS officials and employees to devote their limited
6 resources on implementing the Executive Orders without the competing priority of pre-
7 paring a defense to plaintiffs’ claims. If litigation were to proceed during the Executive
8 Order review period, DHS would be required to prepare and compile administrative
9 records for each of the 35 actions Plaintiffs challenge. Compiling these records will be
10 taxing and burdensome. Such a large investment of government time and resources
11 should not be required where the President has established a mandatory process for the
12 agency to review the very actions challenged in the complaint. Requiring the agency to
13 defend numerous actions that may soon be amended, withdrawn or superseded, is a
14 hardship that could easily be avoided with a stay. *See Lockyer*, 398 F.3d at 1110.

15 Finally, a stay is also warranted to allow the new Administration a reasonable
16 opportunity to formulate its position on issues that have direct bearing on this litigation.
17 Because the Executive Orders each prescribe a specific, limited period in which to
18 accomplish the review contemplated, this Court should allow that review to continue
19 without interference until its completion.

1 III. CONCLUSION

2 Federal Defendants therefore request that this Court stay this case and all pending
 3 deadlines while the Secretary and Attorney General conduct their review of the impli-
 4 cated immigration policies, actions, and directives, and that the stay remain in place until
 5 45 days after the conclusion of review and any resulting recommendations. At the end
 6 of the stay, the parties will submit a joint status report concerning further proceedings in
 7 this matter. If the Court declines to grant a stay, Federal Defendants request 21 days
 8 from the date of the Court's Order to respond to the Complaint.

9
 10 Dated: May 30, 2017

Respectfully submitted,

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